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IN THE

Supreme Court of the United States

October Term, 1952
No. 422

ROBERT W. BURNS and HERMAN P. DENNIS, JR.,
Petitioners,

vs.

ROBERT A. LOVETT, SECRETARY OF DEFENSE, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, Robert W. Burns and Herman P. Dennis, Jr., pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on July 31, 1952.

Opinion Below

The memorandum opinions of the United States District Court for the District of Columbia are reported at 104 F. Supp. 310, 312 (R. 18). The opinion of the Court of Appeals for the District of Columbia is not yet reported (R. 21).

Jurisdiction

The judgment of the Court of Appeals was entered on July 31, 1952 (R. 7). The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1251(1).

Questions Presented

1. Whether an American citizen solider, after trial and conviction by military authorities, may obtain a review of the court-martial conviction in a civil court by habeas corpus where the military proceedings, as a totality, show a complete absence of that fundamental fairness essential to a fair trial under Anglo-American jurisprudence.

2. Whether on the basis of allegations averring flagrant denials of fundamental rights, which in the present posture of these cases are admitted as true, petitioners are entitled to a hearing on the merits and to an independent determination by a civil court as to whether their military trials and convictions violated constitutional due process.

3. Whether these courts-martial were ousted of jurisdiction by the admission of damaging evidence against petitioners when such evidence had been illegally extracted by federal civil authorities while they held petitioners in custody.

Statutes Involved

Title 10, United States Code, Section 1488
Title 10, United States Code, Section 1495
Title 10, United States Code, Section 1542
Sections 686, 780, 825 of the Penal Code of Guam
These are set out in the Appendix

Statement

Petitioners, who are citizens of the United States and members of the United States Air Force, are individually seeking petitions for writs of habeas corpus to secure their release from military custody. One petition is being filed for both petitioners since the issues raised in each case are the same. They are now being detained by the Japan Logistical Command and are awaiting execution of sentences of death pursuant to convictions by general courts-martial of the United States Air Force for the murder and rape of Ruth Farnsworth, a civilian employee on the Island of Guam. The crime took place on or about December 11, 1948 (R. 1-2).

On January 7, 1949, petitioners, who were stationed on Guam, an insular possession of the United States and at that time under the civil administration of the United States Navy, were surrendered by the military authorities to the civil police authorities (R. 2-3). The civil authorities took them into custody and held them incommunicado without process (R. 3). They were subjected to continuous questioning (R. 3), beaten (R. 3), denied sleep and edible food (R. 3) and were not allowed to consult counsel during the entire time they were held in custody (R. 3). Herman P. Dennis, Jr., was subjected to a lie detector test and held in solitary confinement (R. 11), and Robert W. Burns was placed in a death cell (R. 3). Petitioner Dennis had certain pubic hairs taken from his person without being advised of his rights against self-incrimination, and these specimens were subsequently used in evidence against him (R. 12). As a result of coercion, threats and promises, after being told what to say by police officers and without being advised of his rights, he made four confessions on or about January 11, 12 and 13, implicating himself in the crime for which he was subsequently charged (R. 11).

On or about January 30, 1949, the civil authorities returned petitioners to the custody of the United States Air Force (R. 3). On February 1, 1949 (R. 11) and on February 20, 1949 (R. 3) charges were filed against Dennis and

Burns respectively, and they were separately tried and convicted by military courts-martial (R. 3). Their trials were conducted in an atmosphere of hysteria and terror created by both the military and civil authorities on Guam (R. 4). In this connection it should be pointed out that petitioners are Negroes and Ruth Farnsworth was white.

The request of petitioner Dennis for counsel of his choice was denied (R. 12). Defense attorneys were not appointed for him until April 8, 1949, and he did not have the opportunity to receive the advice of counsel until shortly before his trial convened on May 9, 1949 (R. 13). At his trial, the involuntary confessions made by him to the civil authorities were received in evidence despite his repudiation of them and testimony as to their involuntary character (R. 12). Evidence tending to show his innocence was suppressed (R. 12); some witnesses were solicited by the prosecution to perjure themselves (R. 12), while others who sought to help petitioner were intimidated and threatened (R. 12); and manufactured evidence was admitted and used against him at the trial (R. 13).

Petitioner Burns was not furnished counsel, nor allowed to obtain the advice of counsel until one day before his trial (R. 3). Important evidence in his favor was suppressed (R. 4); and testimony against him by Calvin Dennis has since been repudiated as being perjury suborned by the prosecution (R. 4).

The convictions and sentences of the courts-martial were approved by the convening authority (R. 1), and the records forwarded to Washington, D. C., for appellate review in the Office of the Judge Advocate General, United States Air Force (R. 2). The appellate proceedings provided by the military establishment were completed by petitioners when on January 28, 1952, their petitions for new trials were denied by the Judge Advocate General and the sentences of death were ordered executed (R. 2).

Having thus exhausted all available remedies provided by the military, petitioners filed petitions for writs of habeas corpus in the United States District Court for the District of Columbia (R. 1). The convictions and sentences were attacked as void and beyond the jurisdiction of the military courts-martial because of gross irregularities, improper and unlawful practices amounting to a deprivation of fundamental rights guaranteed to petitioners by the Fifth and Sixth Amendments to the United States Constitution and by the Articles of War (R. 4-5). Respondents, without controverting the allegations in the petitions, moved to discharge the rules to show cause and dismiss the petitions on the ground that they failed to state a claim upon which the relief sought could be granted in that the petitions did not state requisite jurisdictional facts (R. 5-8). Upon consideration of these motions, and without factual inquiry, the District Court on April 10, 1952, filed memorandum opinions sustaining respondents' position (R. 18), and on April 17, 1952, entered orders discharging the rules to show cause and dismissing the petitions (R. 20).

Petitioners appealed to the United States Court of Appeals and on July 31, 1952, that court, one judge dissenting, affirmed the judgment of the District Court (R. 57). On September 19, 1952, an order was issued by this Court staying execution of sentences of death imposed pending timely filing and disposition of petitions for writ of certiorari.

Specifications of Error

The court below erred:

1. In refusing to order a hearing on the merits in the district court on petitioners' allegations of denial of fundamental due process by military authorities.

2. In refusing to make its own independent evaluation of the merits of petitioners' claimed denial of constitutional rights in the conduct of the military proceedings.

3. In refusing to hold that these courts-martial lost jurisdiction in permitting the prosecution to use evidence which had been illegally obtained by civil authorities to abet the conviction of these petitioners.

Reasons For Allowance of the Writ

1. This Court has never expressly determined whether violations of the guarantees of fundamental due process in court-martial proceedings can be corrected in a habeas corpus proceeding. The question is one of great importance to the administration of military justice. Moreover, recent opinions of this Court lend support to both a broad and a narrow view of the reach of habeas corpus in this area. As a result there is considerable confusion and uncertainty in the federal courts.

Early cases set forth the rule that the scope of habeas corpus is limited to a test of the jurisdiction of the tribunal rendering judgment. *Ex Parte Lange,* 18 Wall 163; *Ex Parte Siebold,* 100 U. S. 371. Thus, a federal district court, in a habeas corpus proceeding, could only determine whether the judgment was void for want of jurisdiction. This test was applied by this Court to convictions had in state and federal trial courts as well as in courts-martial. See *Ex Parte Siebold,* supra; *Ex Parte Royall,* 117 U. S. 241; *United States* v. *Grimley,* 137 U. S. 147.

In the case of state and federal convictions, however, the reach of habeas corpus has been gradually expanded in a number of landmark decisions. This has been accomplished conceptually by two different approaches. In one

line of cases the concept of jurisdiction has been widened. In *Moore* v. *Dempsey*, 261 U. S. 86, it was recognized that a trial dominated by mob hysteria constituted a denial of due process and was thus absolutely void. In *Johnson* v. *Zerbst*, 304 U. S. 458, where a petitioner had been denied the right to counsel in violation of the Sixth Amendment, this Court held that the trial court thereby lost jurisdiction. As recently as *Sunal* v. *Large*, 332 U. S. 174, it was indicated that a denial of the protection of the Fifth Amendment was "jurisdictional" in nature. See also *Lisenba* v. *California*, 314 U. S. 219, 237.

In a second line of cases, lack of jurisdiction and denial of due process have been considered as two separate and distinct grounds for habeas corpus. *Mooney* v. *Holohan*, 294 U. S. 103 (involving the knowing use by state authorities of perjured testimony), pointed the way by holding that such a conviction could be attacked in habeas corpus proceedings as a denial of due process. More recently, in *Waley* v. *Johnston*, 316 U. S. 101, where the petitioner alleged that his plea of guilty had been coerced, this Court recognized both lack of jurisdiction and denial of due process as bases for the issuance of a writ of habeas corpus.

Irrespective of whether denial of due process has been embraced in an expanded concept of jurisdiction or whether it has been considered as a separate basis for the issuance of the writ of habeas corpus, little confusion has resulted in the area of federal and state convictions. Both approaches have led to the same result. See *Behrens* v. *Hironimus*, 166 F. 2d 245 (C. A. 4th 1948); *Graham* v. *Squier*, 132 F. 2d 681 (C. A. 9th 1942), cert. den. 318 U. S. 777.

With respect to the scope of habeas corpus in the case of court-martial convictions, however, there has been considerable confusion and uncertainty. This Court has never expressly declared that a court-martial conviction in vio-

lation of the guarantees of due process can be corrected in a habeas corpus proceeding, either on the theory of *Johnson* v. *Zerbst*, supra, or the theory of *Waley* v. *Johnston*, supra.

In *Wade* v. *Hunter*, 336 U. S. 684, the same test used in civil cases was applied in determining whether petitioner's conviction by a court-martial was in violation of the double jeopardy provision of the Fifth Amendment. Since it was found that petitioner had not been placed in double jeopardy, it was unnecessary to decide whether a court-martial's overruling of a plea of former jeopardy may be subject to attack in habeas corpus proceedings. In *Humphrey* v. *Smith*, 336 U. S. 695, it was indicated that a court-martial trial not fairly conducted could be collaterally attacked in habeas corpus proceedings. There, Mr. Justice Black stated at page 701:

> "This court-martial conviction resulting from a trial fairly conducted cannot be invalidated by a judicial finding that the pre-trial investigation was not carried on in the manner prescribed by the 70th Article of War."

The two most recent cases, *Whelchel* v. *McDonald*, 340 U. S. 122, and *Hiatt* v. *Brown*, 339 U. S. 103, reiterated the rule that the scope of habeas corpus proceedings is limited to an inquiry into the jurisdiction of the court-martial. Both cases, however, indicate the concept of jurisdiction has been expanded in this area also. In *Whelchel* v. *McDonald*, supra, this Court said that a court-martial proceeding which denied to an accused the right to tender the issue of insanity would be divested of its jurisdiction, but refused to decide whether a denial of due process by a court-martial offers a separate and independent ground to support a petition for habeas corpus. Mr. Justice Douglas, at page 124, stated:

> "We put to one side the due process issue which respondent presses, for we think it plain from the law governing court-martial procedure that there must be afforded a defendant at some point of time an opportunity to tender the issue of insanity. It is only a denial of that opportunity which goes to the question of jurisdiction."

Dicta in other opinions have intensified the uncertainty in this area. In *Johnson* v. *Eisentrager*, 339 U. S. 763, 783, this Court stated that, "American soldiers conscripted into the military service are thereby stripped of their Fifth Amendment rights * * *." Similar expressions can be found in *Ex Parte Quirin*, 317 U. S. 1, 40, 45.

This confusion and uncertainty has been reflected in the opinions of district courts and courts of appeals. Dicta in *Ex Parte Quirin*, supra, led the Court of Appeals for the Second Circuit to declare that the Fifth and Sixth Amendments are inapplicable to a court-martial. *United States* v. *Crystal*, 131 F. 2d 576, 577 n. 2 (CA 2d 1943), cert. den. 319 U. S. 755.[1] In *In re Wrublewski*, 71 F. Supp. 143, the District Court for the Northern District of California, confronted with a petition alleging conviction by a court-martial in violation of the double jeopardy provisions of the Fifth Amendment, held that it lacked jurisdiction, relying on *Ex Parte Quirin*, supra; *Ex Parte Milligan*, 71 U. S. 2; *United States* v. *Crystal*, supra. On appeal the court assumed for the purpose of the decision, that the provision was applicable. *Wrublewski* v. *McInerney*, 166 F. 2d 243 (CA 9th 1948).

Other courts have acted similarly, apparently reluctant in the absence of a clear pronouncement from this Court

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[1] But *cf. United States* v. *Swenson*, 165 F. 2d 756 (C. A. 2d 1948); *Becker* v. *Webster*, 171 F. 2d 762 (C. A. 2d 1949), cert. den. 336 U. S. 968.

to expressly hold that habeas corpus was available to correct violations of due process. See *Schita* v. *King*, 133 F. 2d 283 (CA 8th 1943); *De War* v. *Hunter*, 170 F. 2d 993 (CA 10th 1948), cert den. 337 U. S. 908; *Waite* v. *Overlade*, 164 F. 2d 722 (CA 7th 1947), cert. den. 334 U. S. 812.

On the other hand, the Court of Appeals for the Third Circuit, in *United States ex rel. Innes* v. *Hiatt*, 141 F. 2d 664 (CA 3d 1944), expressly held that an individual does not lose the protection of the Fifth Amendment because he has joined the armed forces and that a civil court in a habeas corpus proceeding may determine whether the court-martial proceeding was in accord with standards of due process.

The decisions in the instant case are typical of this confusion. The District Court dismissed the petition, holding that it lacked jurisdiction to inquire into alleged denials of fundamental due process. The Court of Appeals, while refusing to issue the writ, concluded that habeas corpus is available to correct a denial of due process by military authorities. Its opinion also illustrates the difficulty of resolving this issue in the absence of a clear pronouncement by this Court.

The vital importance of this question to the administration of military justice need not be belabored. Millions of American citizens—members of the armed forces as well as civilians—are now subject to military jurisdiction. The present state of international affairs gives every indication that our armed forces will not be reduced for many years. Military law can no longer be looked upon as a mere instrument for the maintenance of discipline. With so many Americans now affected and likely to be affected in the future, the time is ripe for a clear-cut determination by this Court that those subject to military jurisdiction are not beyond the reach of the protective guarantees of the Federal

Constitution, and that where constitutional guarantees have been abridged under military law, resort may be had to a civil court to secure that protection which the Constitution affords to all American citizens.

2. The decision of the Court of Appeals in not remanding the case to the district court for a hearing is in conflict with *Walker* v. *Johnston*, 312 U. S. 275 and *House* v. *Mayo*, 324 U. S. 42.

Petitioners allege that they were convicted in outrageously unfair proceedings. Buttressed by affidavits of disinterested persons, the petitions for writs of habeas corpus make out cases of grave denials of due process. Respondents denied none of these allegations. Hence, it was incumbent upon the District Court and the Court of Appeals to assume the allegations to be true. *House* v. *Mayo*, supra. Since the District Court held no hearing to determine the validity of petitioners' allegations, the Court af Appeals should have remanded the cause for hearing on the merits. Its failure to do so constituted serious error. *Walker* v. *Johnston*, 312 U. S. 275. There the Court stated in an opinion by Mr. Justice Roberts at page 287:

> "Not by the pleadings and the affidavits, but by the whole of the testimony, must it be determined whether the petitioner has carried his burden of proof and shown his right to a discharge. The Government's contention that his allegations are improbable and unbelievable cannot serve to deny him an opportunity to support them by evidence. On this record it is his right to be heard."

a. Both petitioners allege that they were arrested by the civil police authorities of Guam on January 7, 1949, and that they were held without arraignment by any authority until January 17, 1949. During this time they were

held incommunicado and subjected to continuous questioning; they were also beaten, denied sleep and deprived of edible food. They were not allowed to consult counsel despite their requests (R. 2-3, 10-11; Affidavits of Grimmett, Herman Dennis, Daly and Hill). Further, their detention was in violation of Sections 686, 825 and 780 of the Penal Code of Guam.

Petitioner Dennis further alleges that as a result of physical and mental duress, four confessions were extracted from him on January 11th, 12th and 13th and were introduced against him at his trial. All the confessions were repudiated before, at and after the trial. If these allegations are true, the confessions were clearly coerced and their use at the trial constituted a denial of due process. *Chambers* v. *Florida*, 309 U. S. 227; *Watts* v. *Indiana*, 338 U. S. 49.

The uncontradicted facts as revealed by the court-martial record lead to the inescapable conclusion that the confessions were involuntary. One of the chief witnesses for the prosecution, Albert E. Riedel, a police investigator brought from California, testified that the murder of Ruth Farnsworth had created an atmosphere of extreme tension on Guam (Herman Dennis, C. M. Trans. 207). In this atmosphere a large group of Negro soldiers were asked to take lie detector tests in connection with the investigation with respect to this crime (Herman Dennis, C. M. Trans. 217). Petitioner Dennis submitted to the test on January 7 and was thereafter immediately arrested without being informed of its results. He was held incommunicado until after four confessions were extracted (Herman Dennis, C. M. Trans. 193, 221). After occasional questioning on January 7, 8 and 10th and prolonged questioning on January 11 by two interrogators working in shifts, petitioner Dennis made his first confession (Herman Dennis, C. M.

Trans. 188-200). It should be noted that petitioner Dennis was only 20 years old, with a limited education; he was a member of the armed forces, thousands of miles from home, and accused of a most heinous crime (*United States* v. *Dennis*, 4 A. C. M. 872, 906). In the light of these facts, we submit, the involuntary character of these confessions is clearly established. *Malinski* v. *New York*, 324 U. S. 401; *Ward* v. *Texas*, 316 U. S. 547; *White* v. *Texas*, 310 U. S. 530.

The Court of Appeals disposed of petitioner's allegation concerning these confessions on the theory that their involuntariness was a disputed issue of fact which had been decided adversely to petitioner. It accepted the determination of the military without making an independent evaluation of the evidence for itself. This Court, however, has emphasized that it will make an independent examination of the record to determine the validity of a claim that a coerced confession was used to convict. *Lisenba* v. *California*, supra. Even assuming *arguendo* that the uncontradicted facts do not necessarily lead to a conclusion that the confessions were coerced, the allegations of the petition, considered against the background of the uncontradicted facts, entitled petitioner to a hearing on the merits and to an independent determination by the court of the character of these confessions.

b. Petitioner Dennis also alleges that certain pubic hairs taken from his person during his unlawful detention, and without his being advised of his constitutional rights, were used against him at his trial (R. 12). This, we submit, is compulsory self-incrimination in violation of the Fifth Amendment. See *Rochin* v. *California*, 342 U. S. 165. The Court of Appeals, however, ignored this allegation.

c. Petitioner Dennis further alleges that specimens of his pubic hair presented at the trial were deliberately

planted in an effort to create evidence tending to establish his guilt (R. 13; Affidavit of Herman Dennis). Such conduct on the part of the prosecution would certainly constitute a flagrant violation of due process under the general principles enunciated by this Court in *Mooney* v. *Holonan*, 294 U. S. 103 and *Pyle* v. *Kansas*, 317 U. S. 213. The Court of Appeals disposed of this allegation on the ground that so long as a disputed question of fact had been presented to the duly constituted military authorities, it had no duty to consider it. Again, we submit, that as to this allegation petitioners were entitled to a hearing on the merits in the District Court. Petitioners urge that at the very least the Court of Appeals was required to evaluate the evidence independent of the conclusion reached by military authorities.

d. Both petitioners allege that important evidence relating to Filipino dog-tags and a navy uniform found near the scene of the crime was suppressed by the prosecution (R. 4, 12; Affidavit of Daly). If the allegations are true, these convictions are in violation of the Fifth Amendment. *Mooney* v. *Holonan*, supra; *Pyle* v. *Kansas*, supra.

The Court of Appeals disposed of this on alternative grounds. First, it asserted that the affidavit of Lt. Col. Daly in support of the allegation was insufficient in that it did not show that the prosecution had knowledge of the Filipino dog-tags and the navy uniform. Since the affidavit of Lt. Col. Daly avers that both items were in the possession of the Guam Police Department, and the records in these cases reveal that there was an intimate working relationship between the civil government of Guam and the Air Force, petitioners contend that the civil government acted here as the agent of the Air Force and its knowledge must be imputed to the Air Force. See *Anderson* v. *United States*, 318 U. S. 350 and *Gambino* v. *United States*, 275 U. S. 310. Compare *Gallegos* v. *Nebraska*, 342 U. S. 55, 70.

The alternative holding of the Court of Appeals was that a federal court had no duty to consider this allegation since it was based on a disputed question of fact which had already been presented to the duly constituted military authorities. Again, we submit, petitioners were entitled to a hearing on the merits in the District Court, and that at the very least the Court of Appeals was required to evaluate the evidence independent of the conclusion reached by military authorities.

e. Petitioner Dennis avers that the prosecution sought to procure witnesses to perjure themselves and intimidated and threatened those who sought to help him (R. 12; Affidavits of Grimmett, Daly and Hill). As the dissenting opinion of Judge Bazelon pointed out, the allegation of attempts to suborn perjury is given specific content by the affidavit of witness Mary Hill. She avers that one of the prosecution's chief investigators tried to induce her to make a false statement before the court-martial relating to the voluntariness of Dennis' confession. Moreover, the Judge Advocate General of the Air Force admitted that there was substantial evidence that Mrs. Hill was prevailed upon by the prosecution's investigator to make a false statement (*United States* v. *Dennis*, 4 A. C. M. 872, 906).

Chaplain Grimmet avers that military authorities interfered with his efforts to obtain assistance and counsel for petitioners. Furthermore, Lt. Col. Daly asserts, that as Staff Judge Advocate of the Marianas Air Material Command, he had personal knowledge of the fact that the Chaplain's cables and mail to the United States were intercepted and not delivered to the addressees.

Although the allegations, if true, would render the convictions void, *Mooney* v. *Holonan*, supra; *Pyle* v. *Kansas*, supra, they were ignored by the Court of Appeals.

f. Petitioner Burns alleges that the testimony of Calvin Dennis was coerced and perjured (R. 3-4; Affidavits of Daly and C. Dennis). Calvin Dennis was the principal witness appearing against him: without this testimony, the case against petitioner would be weak indeed. Affiant Calvin Dennis admits that he committed perjury under physical coercion, threats and promises. Corroborating this is the affidavit of Lt. Col. Daly wherein he states that he was present when an officer authorized to act on behalf of the Commanding General promised Calvin Dennis that his sentence would be commuted if he testified against petitioners, and threatened that he would be sentenced to death if he failed to do so.

If the above allegations are true, no court could avoid the compelling conclusion that the convictions were contrived and therefore void. See *Mooney* v. *Holonan*, supra; *Pyle* v. *Kansas*, supra.

The Court of Appeals disposed of this allegation also on the ground that it had no duty to examine the merits of a contention based on a disputed question of fact which had been resolved by the duly constituted military authorities. As previously stated, we take the position that this was error.

g. Petitioner Dennis alleges a gross abuse of discretion in the denial by his commanding officer of counsel of his choice (R. 12; Affidavits of Grimmett, Daly and Hill). The record shows that petitioner Dennis requested Lt. Col. Daly to act as his defense counsel and the Commanding General, after first granting the necessary permission later denied the request. Lt. Col. Daly alleges that charges against him were contrived so that he might be made "unavailable." Affiant Hill asserts that an investigator for the prosecution attempted to induce her to give false testi-

mony at the trial upon the promise that it would be helpful to Col. Daly "who was then in serious difficulties because of his attempt to defend the accused."

Petitioner Burns had only one day to consult counsel of his choice (R. 4). It is true that he was represented by duly appointed defense counsel, but in view of the seriousness of the crime, we submit, his trial should have been continued in order to permit counsel of his choice to adequately prepare his defense.

While this Court has never ruled that such a flagrant abuse of discretion constitutes a jurisdictional defect or violates due process, it is submitted that such conduct on the part of the commanding officer deprives the proceeding of any semblance of fundamental fairness. See *Hiatt* v. *Brown*, supra. The opinion of the Court of Appeals completely side-steps the essence of this contention.

The Articles of War in force at the time of these court-martial proceedings accorded the accused the right to counsel of his own choice if such counsel is reasonably available. A. W. 17. That petitioners may have had adequate counsel does not cure the fact that they were denied the counsel of their own choice by a flagrant abuse of discretion. Similarly, the fact that petitioners may have had competent counsel to prosecute their appeals to the Board of Review and Judicial Counsel is likewise irrelevant. Both petitioners were deprived of effective counsel of their choice by a gross abuse of discretion on the part of military authorities.

f. Petitioners allege that the atmosphere surrounding the trial was one of hysteria and terror (R. 4). This is supported by the affidavit of Chaplain Grimmet who asserts:

> "That the feeling was so tense on the Island and the rumor so strong that there was going to be a riot if

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IN THE

Supreme Court of the United States

October Term, 1952

No. 422

ROBERT W. BURNS and HERMAN P. DENNIS, JR.,
Petitioners,

vs.

ROBERT A. LOVETT, Secretary of Defense, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONERS

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SUPREME PRINTING CO., INC., 41 MURRAY STREET, N. Y., BARCLAY 7-0349
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> the accused were not convicted, that I called the matter to the attention of Col. Tolin who said they were aware of the situation and that riot troops had been alerted in case of violence."

If these allegations are true, the convictions are void. *Moore* v. *Dempsey*, 261 U. S. 86.

The Court of Appeals was of the opinion that no fact shown in the record supported this general allegation. While this may be true,[2] it is proper for a petition of habeas corpus to rely on facts outside the record. *Johnson* v. *Zerbst*, supra; *Waley* v. *Johnston*, supra. Petitioners were entitled to a hearing on the merits in the District Court and the Court of Appeals erred in not remanding the cause for that purpose.

Even assuming *arguendo* that petitioners' rights to a hearing could have been satisfied had the Court of Appeals considered their petitions on the merits, the consideration given by the Court of Appeals to these cases can hardly be deemed a hearing. The fact that the Court of Appeals examined the records and wrote a lengthy opinion may tend to create the illusion that petitioners were afforded a hearing. But the hearing to which these petitioners were entitled necessitated an independent determination by the Court of Appeals of all issues relating to alleged violations of constitutional due process by military authority.

3. This Court should grant certiorari to determine whether the Court of Appeals was correct in holding that the doctrine of exhaustion of remedies as applied to state

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[2] But see the court-martial record of Herman Dennis at page 207.

convictions supplied an accurate analogy for the instant fact situation.[3]

The Court of Appeals, while holding that an accused before a court-martial is entitled to a fair trial within due process of law concepts, placed upon the military authorities the principal responsibility for insuring such fairness. It concluded that habeas corpus will not lie "to review questions raised and determined, or raisable and determinable, in the established military process, unless there has been such gross violation of constitutional rights as to deny the substance of a fair trial and, because of some exceptional circumstances, the petitioner has not been able to obtain adequate protection of that right in the military processes." It analogized the doctrine of exhaustion of military remedies to that of exhaustion of state remedies, relying on the statement by this Court in *Ex Parte Hawk*, 321 U. S. 114, 118 that a federal court will not ordinarily re-examine upon habeas corpus questions adjudicated by state courts, except where resort to those courts "has failed to afford a full and fair adjudication of the federal contentions raised."

a. Even if it be assumed *pro arguendo* that the Court of Appeals was correct in its analogy, the Court should clarify the confusion relative to the application of the doctrine of *Ex Parte Hawk* to a collateral attack on military convictions.

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[3] While this Court in *Gusik* v. *Schilder*, 340 U. S. 128, did indicate that the analogy was a proper one, the Court was there concerned only with the first aspect of the rule—namely that except in exceptional circumstances, a federal court will not entertain a petition for a writ on habeas corpus on behalf of one in state custody unless he has exhausted all state remedies, including an appeal or writ of certiorari from this Court. *Gusik* v. *Schilder* had no application at all to the second aspect of the rule of *Ex Parte Hawk* discussed *infra* at page 20.

The doctrine of *Ex Parte Hawk* has a twofold aspect. The first part of the rule states that federal district court will not ordinarily entertain a petition for a writ of habeas corpus from a prisoner in state custody until he has exhausted all state remedies, including the filing of a petition for a writ of certiorari in this Court.[4] The second aspect of the rule relates to the scope of habeas corpus after all of these state remedies have been exhausted.

The application of the latter portion of the *Ex Parte Hawk* rule has been subject to considerable uncertainty and there exists a conflict among the circuits. The Courts of Appeals for the Fourth and Tenth Circuits have held that where petitioner's contentions have been adjudicated on the merits by the state courts and this Court has denied certiorari, a district court is justified in granting the writ of habeas corpus only in unusual circumstances. *Goodwyn* v. *Smith*, 181 F. 2d 498 (C. A. 4th 1950); *Gault* v. *Burford*, 173 F. 2d 813 (C. A. 10th 1949). On the other hand, the Court of Appeals for the Third Circuit under the same circumstances has held that a district court must hear and determine the petition on the merits. *United States* v. *Baldi*, 192 F. 2d 540 (C. A. 3d 1951), cert. grant. 343 U. S. 903. There Judge Goodrich said at 544:

> "Each point raised by the relator is to be tested by whether it alleges a violation of rights under the United States Constitution: nothing more. That these allegations have been decided on the merits by the highest state court is a fact to be given weight by a District Court in passing upon petitions for habeas corpus. But the fact does not relieve the federal court of the duty to pass upon the merits of the petition."

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[4] Sec. 28, U. S. C. § 2254.

This confusion with respect to the application of the doctrine of *Ex Parte Hawk* is multiplied manifold when the doctrine is transplanted from its home soil to a completely new area—collateral attack on military convictions. Since the *Baldi* case is now pending before this Court, it is especially appropriate that this related issue be decided.

If the view of the Third Circuit is correct, then clearly the Court of Appeals for the District of Columbia erred in the instant case by not remanding the cause to the District Court for a hearing. Even should the approach of the Third Circuit be rejected, the decision of the court below, it is submitted, is in conflict with *Moore* v. *Dempsey*, supra. There petitioner alleged that his trial was conducted in an atmosphere of mob hysteria and this Court held that the presence of a state appellate corrective procedure was not a sufficient ground for a federal court to refrain from examining the facts for itself. Mr. Justice Holmes stated at p. 91:

> "But if the case is that the whole procedure is a mask—that counsel, jury, and judge were swept to the fatal end by an irresistable wave of public passion, and that the state courts failed to correct the wrong * * * perfection in the machinery for correction * * * [cannot] prevent this court from securing to the petitioners their constitutional rights."

When the allegations in the instant cases are considered in their totality, they paint a bleak picture—a proceeding nothing less than shocking which deprived the two accused of the most minimal standards of justice. If these allegations are true, the convictions stand exposed as contrived through a "pretense of a trial" and are as utterly void as the one considered in *Moore* v. *Dempsey*.

b. Appellants further submit that the Court of Appeals, in resolving the instant case by a rule analogous to the doctrine of exhaustion of state remedies, ignored the fact that collateral attack on military convictions brings into play many considerations which are significantly different from those pertinent to a collateral attack on state convictions.

First, an important aspect of the *Ex Parte Hawk* rule is that in exhausting state remedies, the petitioner must seek a writ of certiorari in this Court; *Darr* v. *Burford,* 339 U. S. 200. Thus, even before petitioning a federal district court for a writ of habeas corpus, one convicted by a state court has the right to ask this Court to grant certiorari. Those convicted by a military court-martial, on the other hand, have no similar right to ask this Court to review the proceedings. At the time petitioners were convicted, a writ of habeas corpus offered the only way for any kind of non-military review of the proceedings.

Second, underlying the rule of *Ex Parte Hawk* is the necessity for maintaining a harmonious federal-state relationship. *Darr* v. *Burford,* supra. A collateral attack on court-martial convictions, however, presents no such problem. Once military remedies are exhausted, it can hardly be considered unseemly for a federal district court to upset a determination by a military agency of the federal government.

Third, the court below completely ignored the tremendous differences between military and civil proceedings. The dangers of command control have been the subject of much concern. See Hearings Before Sub-Committee of the Committee on Armed Services on S. 857 and H. R. 4080; United States Senate, 81st Cong. 1st Session (1949); Farmer and Wells, Command Control—or Military Justice, 24 *N. Y. U. L. Q. Rev.* 263 (1949); Notes, 35 *Cornell L. Q.* 15 (1949); 2 *Stanford L. Rev.* 547 (1950). A fair and impartial trial

is obviously difficult in an atmosphere of command control. An officer who the commander believes is too lenient can be removed from service on courts; and defense counsel who is too successful may not remain a defense counsel very long. All the personnel connected with the trial are dependent on the commanding officer for assignments, leaves and positions. Cf. *Report of War Dept. Advisory Committee in Military Justice* (1946). Under these circumstances, officers are necessarily susceptible to command influence.

Similarly, the review procedure in force at the time of petitioners' convictions is a far cry from civilian standards. Review by the Judge Advocate General's department is review by a partially interested party. When as here, motions for new trials are presented to the Judge Advocate General, no hearing is held to permit a petitioner to prove his allegations, no counter-affidavits are submitted; the Judge Advocate General investigates the charges, satisfies himself as to the substance of the allegations, and there is no appeal from his decision. Such proceedings produce no record and a federal district court on habeas corpus must either accept the fairness of the proceedings as a matter of faith, or make an independent inquiry into the truth of the allegations.

In view of the above considerations, we urge this Court to grant the writ and hold that the limitations which some courts have placed on the writ of habeas corpus where state convictions are attacked should not apply to military convictions.[5] Where there are allegations of gross denials

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[5] It has long been held that there is no presumption that a court-martial possessed jurisdiction, since it is a tribunal of limited jurisdiction. *McClaughry* v. *Deming*, 186 U. S. 49, 63. It would seem to follow logically from the above rule that a petitioner alleging such gross denials of due process which would oust the court-martial of its jurisdiction should have the right to prove his allegations in a civilian court.

of due process, as in the instant cases, it is the duty of the district court to make an independent inquiry into the facts.[6] If petitioners are denied their right to a hearing before a civilian court, their rights under the Fifth and Sixth Amendments become mere empty, hollow guarantees.

4. The use of evidence unlawfully obtained by the civil authorities of Guam impaired the jurisdiction of the court-martial proceedings. Petitioners were placed under arrest by the civil authorities on Guam. They were subject to the jurisdiction of the civil government of Guam.[7] Their detention was in flagrant violation of Sections 686, 780 and 825 of the Penal Code of Guam [8] which provide for arraignment before a judge within 24 hours and grant the prisoner on request the right to consult an attorney any time after arrest. As hereinbefore set out, it was during this period that petitioners were held incommunicado without process, denied counsel, subjected to physical and mental duress, and the confessions extracted. Had petitioners been tried by the civil authorities and had the evidence obtained during this period been used to convict them, the convictions clearly could not stand. See *McNabb* v. *United States* 318 U. S. 332; *Weeks* v. *United States*, 232 U. S. 358.

Convictions obtained by the Air Force with the use of such evidence can stand on no stronger ground. One arm of the federal government cannot reap the unlawful fruits of another arm. *Anderson* v. *United States*, 318 U. S. 350; *Gambino* v. *United States*, 275 U. S. 310. See *Gallegos* v. *Nebraska*, 342 U. S. 55, 70.

In the Anderson case appellants were tried and convicted in a federal district court for damaging federal

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[6] See opinion of Chief Judge Biggs in *Hicks* v. *Hiatt*, 64 F. Supp. 238, 249, n. 27 (M. D. Pa., 1946).

[7] Penal Code of Guam (1947) Sec. 27.

[8] Penal Code of Guam (1947).

property. They had been arrested by local authorities, held incommunicado and denied counsel by local and state officers; and coerced confessions were extracted from some of them in violation of state procedure. Subsequently, they were arrested by federal officers and convicted on the basis of the illegal confession secured by the state and local officials. The Court, in reversing the conviction, declared at page 356:

> "There was a working arrangement between the federal officers and the sheriff of Polk County which made possible the abuses revealed by this record. Therefore, the fact that the federal officers themselves were not formally guilty of illegal conduct does not affect the admissibility of the evidence which they secured improperly through collaboration with state officers."

And, this Court in the *Gambino* case said at pages 316, 317:

> "the rights guaranteed by the 4th and 5th Amendments may be invaded as effectively by such cooperation, as by the state officers acting under direction of the Federal officials * * * The prosecution thereupon instituted by the Federal authorities was, as conducted, in effect a ratification of the arrest, search and seizure made by the troopers on behalf of the United States."

Thus, we submit, the courts-martial were divested of jurisdiction by the use of evidence unlawfully obtained by the civil government during the period of petitioners' unlawful confinement, and these convictions cannot stand.

CONCLUSION

Wherefore, for the reasons hereinabove stated, it is respectfully submitted that this petition for writ of certiorari be granted.

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APPENDIX

Title 10, United States Code, Section 1488:

> * * * The accused shall have the right to be represented in his defense before the court by counsel of his own selection, civil counsel if he so provides, or military if such counsel be reasonably available, otherwise by the defense counsel duly appointed for the court pursuant to Article 11 (Sec. 1482 of this title) * * *

Title 10, United States Code, Section 1495:

> * * * No witness before a military court, commission, court of inquiry, or board, or before any officer conducting an investigation, or before any officer, military or civil, designated to take a deposition to be read in evidence before a military court, commission, court of inquiry, or board, or before an officer, conducting an investigation, shall be compelled to incriminate himself or to answer any question the answer to which may tend to incriminate him, or to answer any question not material to the issue when such answer might tend to degrade him.

Title 10, United States Code, Section 1542:

> * * * When any person subject to military law is placed in arrest or confinement, immediate steps will be taken to try the person accused or to dismiss the charge and release him * * *

Penal Code of Guam

Section 27. *Crimes, persons liable to punishment for.* —The following persons are liable to punishment under the laws of this Naval Government of Guam:

(1) All persons who commit, in whole or in part, any crime within this Island;

(2) All who commit any offense without this Island which, if committed within this Island, would be larceny, theft, robbery, or embezzlement under the laws of this Naval Government, and bring the property stolen or embezzled, or any part of it, or are found with it, or any part of it, within this Island;

(3) All who, being without this Island, cause or aid, advise or encourage, another person to commit a crime within this Island, and are afterward found therein;

(4) All who commit any offenses without this Island and outside the territorial jurisdiction of any other country, which if committed within this Island would be a felony, and the offender and body of the crime are subsequently found within this Island.

Section 686. *Right of defendant in criminal action.*— In a criminal action the defendant is entitled:

(1) To a speedy public and oral trial.

(2) To be allowed counsel as in civil actions, or to appear and defend in person and with counsel.

(3) To be informed of the nature and cause of the accusation against him.

(4) To be exempt from testifying against himself.

(5) To be allowed to testify in his own behalf; if he fails to testify, such failure shall not be construed as evidence against him; but if he does so testify, he may be cross-examined like other witnesses.

(6) To have compulsory process issue for obtaining witnesses in his favor.

(7). To produce and examine witnesses in his behalf and to be confronted with and to cross-examine any witnesses against him, in the presence of the court, except that where the charge has been preliminarily examined before a committing judge and the testimony taken down by question and answer in the presence of the defendant, who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness; or where the testimony of a witness on the part of the prosecution, who is unable to give security for his appearance, has been taken conditionally in the like manner in the presence of the defendant, who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness, the deposition of such witness may be read, upon its being satisfactorily shown to the court that he is dead or insane, or cannot with due diligence be found within the Island; and except also that in the case of offenses hereafter committed the testimony on behalf of the prosecution or the defendant of a witness deceased, insane, out of jurisdiction, or who cannot, with due diligence be found within the Island, given on a former trial of the action in the presence of the defendant who has, either in person, or by counsel, cross-examined or had an opportunity to cross-examine the witnesses may be admitted.

(8) To appeal.

Section 780. *Preliminary investigation by the police department. How, when, and where conducted. Powers of the chief of police, Island attorney to attend.*—(a) The conduct of the preliminary investigation as to procedure, time and place lie within the discretion of the chief of police of Guam. (b) For the purpose of investigating public offenses, the chief of police of Guam shall have the power to summon witnesses before him for questioning but shall

provide government transportation to persons so summoned from outlying districts. (c) Whenever any person accused of two public offenses is brought before the chief of police for investigating, such person:

(1) Shall be informed of the accusation against him.

(2) Shall be informed that any statement he may make, may be used against him.

(3) Shall not be compelled to be a witness against himself.

(d) Whenever the investigation indicates that a public offense has been committed triable in the courts of Guam other than in the police courts, the chief of police shall notify the Island attorney. The Island attorney or his deputy shall then attend the investigation by the police department.

Section 825. *Right of attorney to visit prisoner.*—The defendant must in all cases be taken before the judge without unnecessary delay, and, in any event, within 24 hours after his arrest excluding Sundays and holidays; and after such arrest, any attorney at law entitled to practice in the courts of records of Guam may, at the request of the prisoner or any relative of such prisoner, visit the person so arrested.